FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.
No. 752

FRANZ J. BORCHARD and FRIEDA W. BORCHARD,
Petitioners,

vs.

CALIFORNIA BANK, a banking corporation, and CALIFORNIA TRUST COMPANY, a corporation,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

TOM W. HENDERSON,
CHAS. E. DONNELLY,
R. W. PROUDFIT,
DONALD O. WELTON,
912 California Bank Building, Los Angeles,
Attorneys for Respondents.

Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

	PAGE
Statement of Case	2
The Specification of Errors	7
Argument	8
Summary of Argument	8
Point I. Under section 75 (s) of the Bankruptcy Act, the District Court may, in the exercise of a sound discretion, terminate the stay and permit foreclosure at the request of a creditor if it appears that the debtor has had ample opportunity to effect rehabilitation and has been unable to do so, and that further delay would only cause the creditor irreparable loss	10
Point II. An appraisement under section 75 (s) does not bind the District Court in passing upon a secured creditor's petition for leave to foreclose	25
Point III. In a proceeding under section 75 (s) of the Bankruptcy Act, the District Court has jurisdiction to grant a creditor's petition to foreclose without the appointment of a trustee or a sale of the property under the control of the court	28
Conclusion	31

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Comer v. John Hancock Mut. L. Ins. Co. (C. C. A. 8), 80 Fed. (2d) 417	30
Drexel v. Berney, 122 U. S. 241	24
John Hancock Mutual Life Insurance Company v. Bartels, 60 S. Ct. 221	8, 11, 12, 14, 15, 17, 32
Louisville Joint Stock Land Bank v. William W. Radford, 295 U. S. 555	3
Wright v. Vinton Branch of The Mountain Trust Bank of Roanoke, Va., 300 U. S. 440	8, 11, 19, 21

STATUTES.

Bankruptcy Act, Sec. 75	2, 8, 14, 15
Bankruptcy Act, Sec. 75 (s)	2, 3, 7, 10, 24, 26, 27
Bankruptcy Act, Sec. 75 (s) (2)	6, 7
Bankruptcy Act, Sec. 75 (s) (3)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 752

FRANZ J. BORCHARD and FRIEDA W. BORCHARD,

Petitioners,

vs.

CALIFORNIA BANK, a banking corporation, and CALIFORNIA TRUST COMPANY, a corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Respondents, California Bank and California Trust Company, respectfully file and submit this Brief in Opposition to the Petition for Writ of Certiorari filed herein.

Statement of Case.

This is a farm debtor proceeding under the Bankruptcy Act, commenced on November 17, 1934, by the filing of a petition pursuant to Section 75. The history of the case is fully disclosed by the petition of respondents for leave to sell. [Tr. pp. 39-137.] It shows that for more than four years prior to the filing of that petition, the debtors had availed themselves through both Federal and State Courts of all possible bankruptcy and moratory legislation, they having resorted first to one court and then the other as their convenience and necessity required to obtain the full benefit of all laws, both Federal and State which could be of advantage to them. The events leading up to the Order which is the subject of attack may be summarized as follows:

Dates	
November 17, 1934	Petition under Section 75 of the Bankruptcy Act filed by debtors and referred to the Conciliation Commissioner.
March 25, 1935	Appraisers appointed.
May 1, 1935	Appraiser's report filed fixing the value of the real property at $68,550.00.
May 6, 1935	Debtors adjudicated bankrupts under Section 75 (s).

June 26, 1935	Proceedings dismissed upon constitutional grounds following decision of United States Supreme Court in *Louisville Joint Stock Land Bank v. William W. Radford*, 295 U. S. 555.
June 26, 1935	Petition for moratorium relief under the Mortgage and Trust Deed Moratorium Act of California filed in Superior Court of California, in and for the County of Los Angeles.
July 30, 1935	Order granting moratorium relief made by Superior Court.
September 20, 1935	Petition for reinstatement under Section 75 (s), as amended, filed by debtors in United States District Court.
September 20, 1935	Order for reinstatement and restraining order made and filed.
September 30, 1935	Order vacating moratorium order of Superior Court filed.
October 18, 1935	Petition for appointment of appraisers filed.
May 24, 1938	Petition for appointment of appraisers filed.
June 22, 1938	Appraiser's report made fixing value of real property at $87,300.00.
November 10, 1938	Petition of California Bank for leave to sell under trust deeds filed.
March 25, 1939	Order authorizing and permitting sale under trust deeds filed.

At the inception of this proceeding, respondents were the beneficiary and trustee, respectively, under four deeds of trust, securing loans of $65,735.27. As early as 1933, it became necessary for respondent California Bank to make advancements for the payment of taxes, bond installments and insurance in order to protect the security for its loans. During the pendency of the within proceeding, further advancements had to be made by respondent Bank and interest and costs continued to accrue until in 1938, just prior to the filing of respondent's Petition for Leave to Sell, the debt had grown to $89,246.82. The rate of increase is shown by the following table:

Date	Total Amount of Indebtedness
October 26, 1934	$65,735.27
October 26, 1935	70,826.21
October 26, 1936	74,805.61
October 26, 1937	81,437.92
October 26, 1938	89,246.82

[Tr. p. 52.]

The precise condition of respondents' loans was shown on an exhibit attached to the Petition for Leave to Sell. [Tr. pp. 125, 127.] Reference is made to this statement for a detailed account of principal, interest, advancements and costs involved in connection with each loan.

At the time of filing respondents' Petition for Leave to Sell on November 5, 1938, there was unpaid on the real property delinquent taxes for 1937-38 in a sum exceeding $925.00, and taxes for 1938-39 were a lien then due in the sum of $1763.26. [Tr. p. 51.]

During 1936, 1937 and 1938 the proceeds of crops grown on the property were received and dispersed under stipulations by the respondent Bank, substantially all of such proceeds going toward the maintenance of the property. Approximately $14,347.92 was handled in this manner pursuant to stipulations which expressly provided that they were without prejudice to the rights of the parties and of this total sum, only $2,056.64 was applied upon respondents' loans. [Tr. p. 27.] This sum was paid to respondent from the proceeds of sugar beets and on the same date petitioners received from this source for their own use $1,500.00. This was in addition to wages received by petitioner, Franz J. Borchard, on other occasions for all work performed by him in connection with the crops. [Tr. p. 27.] All of these moneys and all of these crops grown upon the property were subject to a first lien in favor of respondent Bank under a Mortgage of Crops which had previously been held to be a valid and continuing lien thereon by a final Order of the District Court. [Tr. pp. 16-18.]

Respondent Bank's loans having increased at a constantly expanding ratio for more than six years, and the Bank being of the conviction that there was no hope or possibility of rehabilitation, a Petition was filed with the Court for an Order Dissolving Its Restraining Order and Authorizing and Permitting a Sale of the Property. At this point, the Bank was also convinced that the indebtedness of petitioners had grown beyond the total value of the security and that any further postponement of liquidation could only be at the expense and damage and to the irreparable loss of the Bank.

Anticipating the filing of the Bank's Petition, petitioners filed with the Conciliation Commissioner another

Petition for Appointment of Appraisers, and a Petition for a Three-year Statutory Stay Order under Section 75(s) (2). In other words, having enjoyed the fullest latitude for more than four years under the protection of the bankruptcy law without making any progress toward rehabilitation, petitioners, nevertheless, sought to obtain an Order giving them three additional years upon the property at respondents' risk and loss. Petitioners had not at any time during the four years paid, or offered to pay, any rental, nor had they sought an Order fixing the reasonable rental value of the property as required by Section 75(s) (2). They had therefore failed to comply with the statute in a most important particular.

The debtors had long previously filed their first Petition for Appraisal and the property had been duly and regularly appraised in May, 1935, [Tr. pp. 3-9] for $68,550.00. Petitioners have never indicated any disagreement with this appraisal, and it must therefore be concluded that they admitted this to be the fair market value of the property. However, no offer was ever made by petitioners to pay the amount of this appraisement or any other amount into Court under Section 75(s) (3).

At all times during the pendency of this proceeding, up to the date of the Order Permitting Sale (nearly five years), petitioners had the benefit of a general Stay Order restraining all proceedings against them. [Tr. pp. 10-12.] Upon the hearing of respondents' Petition to Sell in the District Court, petitioners argued that the Con-

ciliation Commissioner then had under consideration the making of a three-year statutory stay Order under Section 75(s) (2). To avoid embarrassment, under the circumstances, the District Court made an Order enjoining the Commissioner from making a three-year stay Order until the respondents' Petition had been determined. [Tr. pp. 149-150.] Nothing in the record of this case in any way indicates that the Conciliation Commissioner had decided to grant a three-year stay Order at the time the District Court made its injunctive Order of December 7, 1938.

The Specification of Errors.

Petitioners assign as error the decision of the Circuit Court of Appeals that, under Section 75 (s) of the Bankruptcy Act, as amended:

(1) the District Court may, in its discretion, grant a creditor's petition for leave to sell while the Conciliation Commissioner has under consideration the making of a three-year statutory stay order under Section 75(s) (2);

(2) the District Court is not bound to consider as binding the appraisements made in the proceeding if the debtor is unable to refinance himself within three years; and

(3) the District Court has jurisdiction to grant a creditor's petition to foreclose without the appointment of a trustee and sale of the property under control of the Court.

ARGUMENT.

Summary of Argument.

A brief outline of petitioners' argument in this case follows:

POINT I. THE DISTRICT COURT PROPERLY GRANTED THE PETITION OF THE CREDITOR FOR LEAVE TO SELL UNDER THE FACTS OF THIS CASE.

(a) Proceeding under Section 75 of the Bankruptcy Act had been pending for nearly five years during which time debtors had possession of the property without payment of rent.

(b) This case is not controlled by *John Hancock Mutual Life Insurance Company v. Bartels*, 60 S. Ct. 221, but the principles announced in *Wright v. Vinton Branch of The Mountain Trust Bank of Roanoke, Va.*, 300 U. S. 440, are applicable.

(c) The *Bartels* case is distinguishable upon the facts.

(d) There was ample evidence to support the order of the District Court granting respondent's petition to foreclose.

(1) Respondent Bank's loans had increased from $65,735.27 to $89,246.82 during pendency of the proceeding.

(2) No interest had been paid on the loans for six years.

(3) Respondent Bank had been obliged to continually make large advancements for taxes, bond payments, etc., to protect the security.

(4) Indebtedness had increased to a point where it exceeded the appraised value of the security.

(5) There was no reasonable prospect of debtors' rehabilitation.

(e) Petitioners did not comply with the statute, having failed to obtain a statutory stay order during the four years in which the proceeding had been pending.

POINT II. THE DISTRICT COURT WAS NOT BOUND BY APPRAISEMENTS MADE UNDER SECTION 75 (s) IN PASSING UPON CREDITOR'S PETITION.

(a) The Court properly granted the petition in order to save the creditor from further loss where the highest Court appraisement of the property was $87,300.00 and the debt exceeded $89,000.00.

(b) The appraisement of $87,300.00 could not be binding where such appraisement had never been approved by the Conciliation Commissioner or become final.

(c) Petitioners' attempt to overcome the effect of the Court's appraisement by filing affidavits showing the property to be of greater value, nullifies petitioners' contention that the Court appraisement was binding.

POINT III. UNDER SECTION 75 (s) THE DISTRICT COURT HAS JURISDICTION TO GRANT A CREDITOR'S PETITION FOR LEAVE TO FORECLOSE WITHOUT THE APPOINTMENT OF A COURT TRUSTEE.

(a) No objection was made by petitioners below and the point cannot be raised for the first time on appeal.

(b) The Court is given a *permissive* right to appoint a Court trustee for liquidation; it is not mandatory that the Court do so.

(c) It would have been an idle act to require the appointment of a trustee in this case.

POINT I.

Under Section 75 (s) of the Bankruptcy Act, the District Court May, in the Exercise of a Sound Discretion, Terminate the Stay and Permit Foreclosure at the Request of a Creditor if It Appears That the Debtor Has Had Ample Opportunity to Effect Rehabilitation and Has Been Unable to Do So, and That Further Delay Would Only Cause the Creditor Irreparable Loss.

Petitioners argue that a District Court must stand by while a Conciliation Commissioner makes a three-year stay order under Section 75 (s) even though the District Court itself has found on substantial evidence (1) that the debtor has already had ample opportunity to effect rehabilitation and has failed to accomplish anything in that direction; (2) that there is no equity in the debtor's property above the amount of the claims against it; and (3) that further delay will only injure irreparably the secured creditor.

The Circuit Court of Appeals in its opinion correctly disposed of this contention when it said:

> "The gist of their first assignment is that the District Court erred in permitting foreclosure of liens upon the property while the conciliation commissioner had under consideration the making of a stay order under Section 75 (s) (2). The argument seems to be that such a stay order is mandatory. To this we do not agree. It was said in Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke, 300 U. S. 440, 462, wherein the Supreme Court upheld the constitutionality of Section 75 (s):
>
> "'* * * paragraph 3 also provides that "If . . . the debtor at any time . . . is unable

to refinance himself within three years," the court may close the proceedings by selling the property. **This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period.'" [Tr. p. 189.]

Petitioners seek to show that the recent decision of this Court in *John Hancock Mutual Life Insurance Company v. Bartels*, 60 S. Ct. 221, overrules *Wright v. Vinton Branch of The Mountain Trust Bank of Roanoke, Va.*, 300 U. S. 440. We respectfully submit that this is not so and that the decision of the Circuit Court of Appeals on rehearing in the case at bar correctly interpreted the decision in the *Bartels* case when it stated:

> "Appellants have filed a petition for rehearing, contending that the case of John Hancock Mutual Life Ins. Co. v. Bartels, ... U. S. ....., 60 S. Ct. 221 (December 4, 1939), decided by the United States Supreme Court a few days subsequent to our decision in the instant case, holds contrary to our decision.
>
> "We have examined the Hancock case, *supra*, and do not agree with appellants' interpretation of the case.
>
> * * * * * * * *
>
> "In our decision we relied on the case of Wright v. Vinton Branch, *supra*, which held that the Act 'must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that

---

*All emphasis ours unless otherwise indicated.

the debtor can rehabilitate himself within the three-year period.' This construction was given the statute in order to uphold its constitutionality. The language which we relied upon in our decision is not the language of which the Supreme Court disapproved in the Hancock case, *supra*.

"Appellants argue that the Hancock case holds that it is the duty of the District Court to follow the statute, and argue therefrom that the District Court erred in permitting foreclosure of liens upon the property while the conciliation commissioner had under consideration the making of a stay order.

"We adhere to our decision that the District Court has discretion to terminate the stay if at any time it appears that rehabilitation is not reasonably probable, and that in the instant case, it does not appear that the District Court abused that discretion." [Tr. pp. 198-199.]

The facts in the *Bartels* case were entirely dissimilar to the case at bar. The following major differences may be noted:

(1) In the *Bartels* case the question was whether the District Court was correct in setting aside the adjudication under subsection (s) and dismissing the entire proceeding. In the case at bar the debtors were adjudicated under subsection (s) and no question has been raised as to the propriety of such adjudication or the proceedings predicated thereon. Neither the adjudication of the debtors under subsection (s) nor the proceeding itself was affected

by the Court's order in the instant case. Bartels on the other hand was denied the right to be adjudicated under subsection (s) and his appeal went up involving that question; the debtors in the case at bar, were adjudicated bankrupts under subsection (s) on Mar. 6, 1935, and their persons and property remained subject to that section until the Court's order on Mar. 25, 1939, permitting the appellees to foreclose their liens. In the *Borchard* case the appeal involves the order of the District Court granting the creditor's Petition for Leave to Foreclose Liens on Real Property which petition was PRESENTED TO THE COURT AFTER THE FARMER-DEBTOR HAD RECEIVED CONSIDERABLY MORE TIME FOR REHABILITATION THAN THAT CONTEMPLATED BY THE LAW IN QUESTION.

(2) In the *Bartels* case, only four months and three days had expired from the inception of the proceeding until its dismissal. Bartels had spent less than three months under subsection (s) when the District Court terminated the proceeding. In the instant case, the debtors have had the benefit of almost a five-year stay—nearly two years more than the three-year period contemplated by the Act—during all of which time they enjoyed the relief and all the benefits and advantages of, and had their property dealt with under, subsection (s), and during all of which time appellees were restrained by court order from taking any steps to foreclose their liens. The debtors herein have received everything the Supreme Court and the Circuit Court of Appeals for the Fifth Circuit held Bartels was entitled to. Bartels was denied the experience of being under subsection (s), whereas the debtors herein would soon have had double the time allowed for rehabilitation. The Court's order which debtors herein appeal from

simply holds in substance and effect that the debtors, after obtaining all the benefits of subsection (s), can no longer hinder or delay enforcement of the creditor's liens, which liens the act in question expressly states shall be preserved.

The debtors in the case at bar received all of the benefits of Section 75 and its various subsections. They were adjudicated under (s); their property was appraised not once, but twice, the first time in May, 1935, four years prior to the filing of the last petition for appraisement; they were allowed to retain possession of all of their property under the supervision of the Court for nearly five years; they did not pay any rental whatever, at any time, notwithstanding the provisions of the applicable law; and they did not at any time tender or offer to pay the amount fixed by the appraisement for the property. They did not keep the taxes paid; on the contrary, the Bank was obliged to advance its own money to pay taxes and bonds. It cannot be refuted in this case that the debtors had not only all of the benefits of Section 75, but they were not obliged to bear the burdens imposed by the statute in the form of payments into court for the discharge of taxes, the upkeep of the property, or application upon their debts.

The gist of this Court's decision in the *Bartels* case is that where a debtor complies with Subsections (a) to (r) of Section 75, he is entitled as a matter of right to be adjudicated under Subsection (s) and to have his proceeding entertained and his property administered under that section; that adjudication under Subsection (s) cannot be denied or the proceeding dismissed because there does not then appear to be a reasonable probability of financial rehabilitation. This holding accords with the

spirit of Section 75 since the debtor is presumed to be in financial distress at the time he files under that statute and a maximum period of three years is allowed to permit the debtor to demonstrate what he can accomplish in the way of rehabilitation. To deprive him of the right to file his Petition under Subsection (s) upon the ground that he then had no reasonable prospect of rehabilitation, would be to restrict the benefits of the law to an extremely limited number or class of distressed farmers. The plain purpose of the law was to grant a moratorium during which the farmer could at his option do certain things, and as a duty was required to do certain other things. Judge Sibley, who wrote the opinion of the Circuit Court of Appeals for the Fifth Circuit which was affirmed by this Court in the *Bartels* case, uses these words in outlining the use of Subsection (s):

> "Confusion has arisen, we think, touching the way in which Subsection (s) fits into the scheme of bankruptcy, as to when the stay provided therein may be denied, and how security holders are to have their rights preserved. Farmers were favored in the original Bankruptcy Act in that while they might voluntarily go into bankruptcy, they could not be forced in. This is continued in proceedings under Section 74 (1) 11 U. S. C. A. Sec. 202 (1). Section 75 deals only with farmers, and as stated at its end, Subsection (s) (6), 11 U. S. C. A., Sec. 203 (s) (6) is emergency legislation, limited originally to 5 years, and not to be applied where the Judge finds no emergency to exist locally. * * * Creditors as a rule do not wish farms, * * * Section 75 is intended to serve all these interests while seeking mainly to help distressed farmers so far as that may rightly be done, * * * The applicant under Section 75 is at first

not a bankrupt, but a debtor. The aid of the court is first extended to secure a voluntary adjustment with his creditors. * * * If this adjustment can not be accomplished, the farmer may wholly drop the matter or he may turn to Subsection (s) and 'amend his Petition * * * asking to be adjudged a bankrupt.' When so adjudged he becomes a bankrupt under the Bankruptcy Law, required to surrender his property except exemptions, and entitled to ask a discharge from his debts. But Subsection (s) introduces for a farmer who timely invokes it very important changes in the applicable bankruptcy law. Instead of immediately surrendering his property, and especially his farm and equipment, he may retain them, or so much as he requests, for three years, paying a reasonable rent for them. * * *. But secured creditors whose liens antedate the law have as to their security vested rights which must be effectuated. * * * A creditor with a mortgage on the farm may be able to force a sale which will defeat a rehabilitation of the farmer which might otherwise have been accomplished. And, although there be no secured debts, or they are not urgently pressed, rehabilitation may appear to be impracticable, or pending it the farmer may breach his obligations, and then ordinary bankruptcy procedure may be ordered to go forward as Subsection (s) (3) declares. In neither case under a proper construction of Section 75 is the entire proceeding to be dismissed. On the contrary, when the rehabilitation sought by Subsection (s) fails, the farmer is still a bankrupt, and his estate is to be administered and his debts discharged as in other cases of voluntary bankruptcy. 'In proceedings under this section [Section 75] except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers and duties of its of-

ficers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition asking to be adjudged a bankrupt was filed with the clerk. * * *' Bartels * * * rightfully asked adjudication as a bankrupt, invoking Subsection (s). *His secured creditor had the right thereafter to ask the court for a sale or other disposition of the security, if the delay and rentals fixed under Subsection (s) would impair his vested rights.* * * * The adjudication under Subsection (s) is good if the farmer never makes any application to retain possession of his property and for its appraisal and a stay of all other proceedings. The language of the statute shows that such application is optional, and the option may be lost by failure to assert it at the times the statute names. 'Such farmer may, at the same time, or at the time of the first hearing, petition the court that all of his property * * * * be appraised,' etc. If no such petition is made, or if later the benefits of possession and stay are defeated, the adjudication stands as a voluntary adjudication in bankruptcy. Appropriate proceedings ought to follow."

Reviewing the terms of the statute, this Court in the *Bartels* case concluded:

"The procedure under Subsection (s) is intended to protect all interests. * * * if there has been compliance with the statutory conditions, the court is directed *to stay all proceedings against the debtor or his property for a period of three years* and *during that time* the debtor may retain possession of all or

part of his property subject to the court's control, provided he pays a reasonable rental semi-annually. That rental is to be paid into court and is to be used, first for the payment of taxes and upkeep of the property and the remainder is to be distributed among the creditors as their interests may appear. If the court finds it necessary to protect the creditors 'from loss by the estate' or 'to conserve the security,' the court * * * in addition to the prescribed rental may require payments to be made by the debtor on the principal of his debts in the manner set forth. * * * There is the further proviso, for the protection of secured creditors, that upon request in writing by any secured creditor the court shall order the property upon which the secured creditor has a lien to be sold at public auction. See *Wright v Vinton Mountain Trust Bank, supra* (300 U. S. pp. 458-461, 81 L. ed. 741, 742, 57 S. Ct. 556, 112 A. L. R. 1455, 33 Am. Bankr. Rep. (N. S.) 353) * * *

"If, however, the debtor at any time fails to comply with the provisions of the section or with any orders of the court made thereunder or is unable to refinance himself within three years, the court may order the appointment of a trustee and direct the property to be sold or otherwise disposed of as provided in the Act.

"The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the

priorities and liens of secured creditors being preserved. See *Wright v. Vinton Mountain Trust Bank, supra; Adair v. Bank of America Nat. Trust & Sav. Asso.*, 303 U. S. 350, 354-357, 82 L. ed. 889, 892-895, 58 S. Ct. 594, 35 Am. Bankr. Rep. (N. S.) 725; *Wright v. Union Cent. L. Ins. Co.*, 304 U. S. 502, 516, 517, 82 L. ed. 1490, 1500, 1501, 58 S. Ct. 1025, 36 Am. Bankr. Rep. (N. S.) 950."

We respectfully submit that there is nothing in the *Bartels* decision which overrules the following clear and positive views expressed by this Court in *Wright v. Vinton Branch of The Mountain Trust Bank of Roanoke, Va., supra:*

"Whether, in view of the emergency, an absolute stay of three years would have been justified under the bankruptcy power, we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession. Their phraseology is lacking in clarity. BUT WE ARE OF THE OPINION THAT, WHILE THE ACT AFFORDS THE DEBTOR, ORDINARILY, A THREE-YEAR PERIOD OF REHABILITATION, THE STAY PROVIDED FOR IS NOT AN ABSOLUTE ONE: AND THAT THE COURT MAY TERMINATE THE STAY AND ORDER A SALE EARLIER."

* * * * * * * *

"PARAGRAPH 3 ALSO PROVIDES THAT 'IF . . . THE DEBTOR AT ANY TIME . . . IS UNABLE TO REFINANCE HIMSELF WITHIN THREE YEARS,' THE COURT MAY CLOSE THE PROCEEDINGS BY SELLING THE

PROPERTY. THIS CLAUSE MUST BE INTERPRETED AS MEANING THAT THE COURT MAY TERMINATE THE STAY IF AFTER A REASONABLE TIME IT BECOMES EVIDENT THAT THERE IS NO REASONABLE HOPE THAT THE DEBTOR CAN REHABILITATE HIMSELF WITHIN THE THREE-YEAR PERIOD.

"Finally, the intention of Congress to make the stay terminable by the court within the three years is shown also by Paragraph 6, which declares the Act an emergency measure, and provides that:

'if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate.'

"Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history of the bill is thus surveyed, IT BECOMES CLEAR THAT TO CONSTRUE THE ACT OTHERWISE THAN AS GIVING THE COURTS BROAD POWER TO CURTAIL THE STAY FOR THE PROTECTION OF THE MORTGAGEE WOULD BE INCONSISTENT NOT ONLY WITH PROVISIONS OF THE ACT, BUT WITH THE COMMITTEE REPORTS AND WITH THE EXPOSITION OF THE BILL MADE IN BOTH HOUSES BY ITS AUTHORS AND THOSE IN CHARGE OF THE BILL AND ACCEPTED BY THE CONGRESS WITHOUT DISSENT. WE CONSTRUE IT AS GIVING THE COURTS SUCH POWER."

The Opinion of the Circuit Court of Appeals in the case at bar places reliance upon the above quoted language of this Court in the *Wright* case when it states:

> "It seems clear from the case of Wright v. Vinton etc., *supra*, that the granting or denial of a petition for authority to foreclose in proceedings such as we have before us is at all times a matter for the exercise of the court's discretion. It is the well settled rule that an appellate court will not review the action of a lower court as to matters within its discretion unless it appears that there has been an abuse of discretion, and we find no such abuse." [Tr. p. 190.]

In demonstrating that the District Court had carefully considered the question whether respondents' Petition for Leave to Sell should be granted, the Circuit Court of Appeals in this case quotes the Memorandum Opinion of the District Court as follows:

> "The District Court expressed its opinion by the following memorandum:
>
> "'It appears that the indebtedness of the debtors to the bank has constantly increased in amount since 1934. In October of that year the total was $65,735.27. At the time the last motion was filed the indebtedness had grown to the amount of $89,246.82. The claim of the bank is that it is threatened with loss and that the property is insufficient in value to satisfy the amount of the debt owing to it. On the other hand, the debtors claim that their property is worth approximately $90,-

000.00. They submitted several affidavits of individuals who supported their contention with regard to the value. It appears that appraisers appointed by the conciliation commissioner appraise the total value of the property at $87,300.00. In addition to this, the bank submitted affidavits of two real estate brokers who fix the value at $55,085.00 and at $68,552.00 respectively. An employee of the bank makes affidavit that the assessed value of the property for tax purposes for the fiscal year 1937-1938 is a total of $30,400.00. It is quite a common understanding that assessors appraise real property at about 50% of its actual value. The highest appraisement figure given by the real estate brokers would seem to represent approximately the correct market value." [Tr. p. 188.]

And in examining the basis of the District Court's Opinion, the Circuit Court of Appeals reviews the pleadings in the case and that Court's findings as follows:

"The allegations of the appellees' 'Petition for Leave to Sell Under Deeds of Trust' are to the effect that the total indebtedness to the petitioner at the time of filing the petition was in excess of $89,000.00; that taxes in the sum of $1,763.26 were then a lien upon the property; that for more than three years last past the total amount of indebtedness had steadily been increased until at the date of the petition the total amount of increase in said indebtedness since the inception the proceedings amounted to approximately $25,000.00; that the appellants for

more than three years last past had been and were at the time of filing the petition unable to financially rehabilitate themselves or to refinance said loans; and that they had no equity in the property. The appellants filed no answer to appellees' petition. The only document filed in opposition to the petition, other than affidavits of appraisal, was an affidavit of counsel for appellants, which affidavit was based solely upon the fact that the proceedings were at that time pending before the conciliation commissioner. Whether or not there was an issue as to the facts upon which the appellees' motion was made, and whether or not a duty rested upon the appellees to otherwise prove those facts, the court's memorandum shows that he considered all of the pertinent facts that had been presented in the proceedings before ruling on the motion.

"In addition to the above, it appears without dispute that the total indebtedness including principal, advancements and interest, excluding the foreclosure costs, etc., which are complained of, amounts to in excess of $83,000.00, and is increasing rapidly because of accruing interest and taxes. In view of the court's finding that the property was valued at only $68,552.00, there was no error in the finding that the debtors are unable to financially rehabilitate themselves. From the evidence this would follow almost to a mathematical certainty. However, we are not prepared to say that the order would not have been proper even if the full value as claimed by appellant had been found to be the true value.

"Appellants argue that it was error for the court to treat the total indebtedness and all of the security as a single unit for the purpose of determining the propriety of granting the petition for leave to sell, since there were four separate parcels of land, securing separate loans. With respect to this argument, we deem it sufficient to say that the very large load of ever increasing indebtedness as demonstrated by the undisputed evidence amply supports a finding that there was no reasonable possibility of appellants' rehabilitation. In these circumstances there was no abuse of discretion in the trial court's making one finding respecting the entire indebtedness of appellants to appellees." [Tr. pp. 192-194.]

Petitioners' complaint that the District Court failed to "follow the orderly procedure" of the statute in enjoining the Conciliation Commissioner from making a three-year stay order under Section 75 (s) until a determination of respondents' petition for leave to sell, is wholly without merit. Petitioners' own failure to comply with the statute and obtain a three-year statutory stay order at any time during the previous four years, when there was nothing to prevent the entry of such an order, renders their contention as unequitable as it is unsound. On the plainest principle of justice petitioners are precluded from taking such a position. To permit them to do so would make this case *"one where the forms of law are used to defeat that which, in equity, constitutes the right."* (*Drexel v. Berney*, 122 U. S. 241.)

POINT II.

An Appraisement Under Section 75 (s) Does Not Bind the District Court in Passing Upon a Secured Creditor's Petition for Leave to Foreclose.

Petitioners argue that the District Court was bound to consider the appraisement of June 22, 1938, fixing the value of the property at $87,300.00, as conclusive in passing upon respondents' petition for leave to foreclose; that the District Court therefore erred in finding the property to be of less value; and that the Circuit Court of Appeals erred in approving this action of the District Court.

The substance of petitioners' argument is that if the security for a debt in excess of $89,000.00 is appraised at $87,300.00, the Court may not permit a foreclosure sale of the security to save the secured creditor from further loss. We respectfully submit that this argument is without merit. If it be assumed for the purpose of such argument, that the Court was actually bound by the June 22, 1938, appraisement to find the debtors' property worth $87,300.00 there would still have been no equity in the property for the debtors, while the debt load was admittedly increasing at an ever greater rate.

It is also argued by petitioners that no objections, exceptions or appeals from the appraisal of June 21, 1938, having been taken, it became final. This, however, is clearly incorrect since no order was ever made by the referee approving the appraisal, and the time for filing objections, exceptions and taking appeals from appraisals

does not commence to run until the referee has given such approval. Section 75 (s) provides in part:

> "The appraisals shall be made in all other respects with rights of objections, exceptions, and appeals, in accordance with this Act: Provided, That in proceedings under this section, either party may file objections, exceptions, and take appeals within four months *from the date that the referee approves the appraisal.*"

Moreover, the initial appraisal in this case, filed May 1, 1935, fixed the value of the property at $68,550.00. [Tr. pp. 3-9.] This is almost precisely the same value which the District Court placed upon the property when in its Memorandum of Decision it said:

> "It appears that appraisers appointed by the conciliation commissioner appraise the total value of the property at $87,300.00. In addition to this, the bank submitted affidavits of two real estate brokers who fix the value at $55,085.00 and at $68,552.00, respectively. * * * The highest appraisement figure given by the real estate brokers would seem to represent approximately the correct market value." [Tr. p. 152.]

If petitioners' argument has any validity, they must concede that the *first* appraisal and *not the second* would be binding on the Court. This being so, the Court properly found the property to be worth the amount of the first appraisal and could not therefore have been in error.

But the best evidence that the petitioners themselves did not consider the appraisal of June 1, 1938, or any other appraisal, final or conclusive, is found in the record of this case. Upon the hearing of respondents' petition for leave to sell, petitioners did not urge the trial court to find that any appraisal was binding; they did not even raise the point, but they did attempt to convince the trial court by means of affidavits that the property was worth far more than the amount fixed by the Conciliation Commissioner's appraisers. These affidavits were received by the court in evidence and form a part of the record. [Tr. pp. 143-149.] Petitioners have therefore shown by their own conduct that they did not believe any appraisement made in this proceeding was binding upon the District Court and they should therefore be foreclosed from raising the issue here.

Finally, respondent respectfully submits that the conclusion reached in this case by the Circuit Court of Appeals, that the provisions for appraisement under Section 75 (s) had no bearing upon the right of the court to authorize foreclosure, is correct and in accordance with the law.

POINT III.

In a Proceeding Under Section 75 (s) of the Bankruptcy Act, the District Court Has Jurisdiction to Grant a Creditor's Petition to Foreclose Without the Appointment of a Trustee or a Sale of the Property Under the Control of the Court.

Petitioners argue that the District Court had no jurisdiction to permit a foreclosure in this case without the appointment of a court trustee or a sale of the property under the control of the court. This contention is fully answered by the Circuit Court of Appeals in its opinion, as follows:

> "Appellants' final argument is to the effect that the trial court could not lawfully authorize a sale under the trust deeds before a trustee in bankruptcy was elected. This objection was not made in the court below, and cannot be considered for the first time on appeal. We do not consider it a question going to the jurisdiction of the court. In this connection we approve the language of the court in In re Ostlind Mfg. Co., 19 Fed. Supp. 836, 838-9. (D. C. D. Ore. 1937) as follows:
>
> "'The fundamental purpose of the acts relating to bankruptcies is to conserve the properties for the benefit of the debtor and creditors alike or to reduce the assets to cash for distribution among the creditors. All the specific directions of these laws, although mandatory in form, are subservient to these major purposes. The courts have authority to deal comprehensively with the real and personal property of the bankrupt so long as such purposes are carried out. * * *
>
> "'But it may be objected that since the provisions of the statute are mandatory, violation thereof re-

moves the foundation for the orders. But jurisdiction once established is not so avoided. * * *

"'But where a court has jurisdiction, it is not obliged to render correct decisions. It has the authority to hear and determine. If within the scope of power and founded in jurisdiction, the decision, whether right or wrong, is a judicial act and a finality.'" [Tr. pp. 194-195.]

The particular language of the statute which gives rise o petitioners' contention is the following:

"Section 75 (s) (3) . . . If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this action, or is unable to refinance himself within three years; *the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided in this Act.*"

The above language merely gives the court a permissive right to order the appointment of a trustee and cannot be considered to impose any duty upon the court o do so.

Petitioners seek to invoke a rule said to be applicable o ordinary bankruptcies under the general bankruptcy aw that a trustee must be appointed before a referee nay permit a foreclosure sale outside the court. But the eason for such rule does not exist in proceedings under ection 75 (s) where the debtor is actively safeguarding he interests of his estate and challenging the right of the ienor to foreclose at every step.

In *Comer v. John Hancock Mut. L. Ins. Co.* (C. C. A. 8), 80 Fed. (2d) 417, the court refers to the reason for such a rule in ordinary bankruptcies, as follows:

> "It is well settled, if not fundamental, that a trustee in bankruptcy takes title to the real estate of a bankrupt, and that such title relates back to the date of filing the petition. Till the trustee is elected, there is not in existence any one to represent the estate, against attacks made on the trustee's title to real estate, or to represent the estate when an order of sale is sought by lienors."

It would have been an idle and useless act to require the appointment of a trustee in this case as a condition precedent to an order allowing an outside sale of the encumbered property when the proceeding had been pending for over four years; no unsecured creditors were complaining of the order; and the court itself had fully examined into the question of the value of the property and the prospects of rehabilitation. The words of the court in *Comer v. John Hancock Mut. L. Ins. Co., supra*, are applicable to petitioners' contention on this phase of the case:

> "This reference was to the fact that the subject of bankruptcy . . . . is allocated to the category of equity (Local Loan Co. v. Hunt, 292 U. S. 234, 240, 54 S. Ct. 695, 78 L. Ed. 1230, 93 A. L. R. 195), and that an equity court ought not to countenance such injustice as would flow from the approval of appellants' contention. In other and vernacular words, no court of equity should allow one person to be robbed albeit under the empty shell and form of law, so that another shall be unjustly enriched; and this is so even though equity will follow the law, unless the law works inequity."

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals in this case is correct and in accordance with the law and the facts, it having been conclusively shown: (1) that the within proceeding had been pending nearly five years at the time respondents' petition for leave to foreclose was filed; (2) that during all of said period petitioners had occupied the property and enjoyed all of the benefits of subsection (s) of Section 75 without the necessity of paying any rental as required by said subsection; (3) that petitioners failed to comply with the requirements of the statute in that they did not seek to obtain a statutory stay and rental order for more than four years after the inception of the proceeding; (4) that although more than four years elapsed following the May, 1935, appraisement, petitioners never offered to pay the amount of said appraisement, or any other sum, for the property; (5) that during all of said period the indebtedness of petitioners to respondents had been constantly increasing; (6) that during said period petitioners had failed to keep the taxes, bond installments and insurance paid up and respondent Bank had consequently been compelled to advance large sums for this purpose (approximately $5,278.59 being owing on this account); (7) that the indebtedness had increased to the point where it far exceeded the value of the security; (8) that no reasonable hope existed for rehabilitation of the debtors because, in addition to the circumstances shown, the debtors had been unable to make any move whatever to-

wards their financial rehabilitation during the years they had enjoyed the benefits of the statute; and (9) that upon every just view of the case it was fair and equitable to allow the Bank to take proceedings which would save it from further loss.

For the reasons stated, we respectfully submit that the decision of the Circuit Court of Appeals in this case is not in any way at variance with the decision of this Court in *John Hancock Mutual Life Insurance Company v. Bartels*, 60 S. Ct. 221; that no important question of either bankruptcy or general law is involved, and that there is no basis for the issuance of a Writ of Certiorari in the within cause.

Respectfully submitted,

TOM W. HENDERSON,
CHAS. E. DONNELLY,
R. W. PROUDFIT,
DONALD O. WELTON,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 752.—October Term, 1939.

Franz J. Borchard and Frieda W. Borchard, Petitioners,
vs.
California Bank and California Trust Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 20, 1940.]

Mr. Justice Roberts delivered the opinion of the Court.

We granted certiorari in this case for the reason that it presents important questions with respect to the procedure required by § 75(s) of the Bankruptcy Act, as amended.[1]

The precise matter in controversy is whether the bankruptcy court may permit foreclosure of mortgage liens where the procedure prescribed by § 75(s) has not been followed.

The petitioners, husband and wife, are farmers. Over the period January 24, 1927 to June 19, 1933, they borrowed from the respondent, the California Bank, a total of $87,566.93, in varying amounts, executing to the bank their promissory notes for the respective loans together with deeds of trust[2] on their farm real estate as security. From time to time they made payments which reduced the principal of the indebtedness to $53,919.20. The lender, in the meantime, had made some advances towards the payment of taxes on the property. Further to secure their indebtedness they executed, on January 30, 1934, a mortgage on all the crops standing or growing, or which should thereafter be planted, grown, cultivated, cut, gathered, packed, or harvested, during the life of the mortgage on certain of their farm real estate.

November 17, 1934, they filed their petition under § 75 of the Bankruptcy Act, which was approved and referred to a Conciliation Commissioner. In January 1935 the respondent bank declared de-

[1] Act of March 3, 1933, c. 204, 47 Stat. 1467; Act of June 28, 1934, c. 869, 48 Stat. 1289; Act of August 28, 1935, c. 792, 49 Stat. 942. The Act has been further amended in particulars not here important by the Act of June 22, 1938, 52 Stat. 840, 939. Section 75, as it now stands, is Tit. 11, U. S. C. § 203.

[2] The deeds of trust ran to the respondent Trust Company as trustee.

faults, and recorded notices thereof and of its election to cause the property to be sold pursuant to the deeds of trust, and the law of California.

March 25, 1935, the Conciliation Commissioner appointed appraisers who filed an appraisal on May 1 valuing the debtors' real estate at $68,550. It is to be noted that § 75 contains no provision for appraisal during the course of the conciliation proceedings covered by sub-sections (a) to (r); nor do we find any rule of the District Court providing for appraisal at this stage of the cause. The transcript of record does not disclose whether this appraisal was asked by any creditor or by the debtors. So far as appears, the order for the appointment of appraisers was made by the Conciliation Commissioner of his own motion.

The debtors were unable to obtain the requisite acceptance of creditors to the composition and extension proposal they submitted. As a consequence, they amended their petitions and prayed to be adjudicated bankrupts in accordance with the provisions of § 75(s). The petition was granted and an adjudication entered May 6, 1935. Apparently no further proceedings were taken until June 26, 1935, when the bankruptcy cause was dismissed on the ground that this court had held § 75(s) unconstitutional.[3] On the same day the debtors petitioned a local court for relief under a State moratorium act and obtained an order granting a moratorium, which remained in effect until September 20, 1935, when the debtors filed a petition for reinstatement of the bankruptcy cause in accordance with the amendment of § 75(s) adopted to meet the decision in the *Radford* case.[4] On the same date the District Court approved the petition, ordered the proceedings reinstated, and referred the case to a Conciliation Commissioner in accordance with the provisions of § 75(s). The court restrained the respondents from selling, or proceeding with a sale of, the real estate covered by the deeds of trust and also enjoined them from collecting from packers or processors the proceeds of crops covered by mortgage, until the further order of the court.

October 18, 1935, the petitioner Franz J. Borchard presented his petition to the Conciliation Commissioner praying that appraisers be appointed; that his exempt property be set aside to him, and that

[3] Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555.

[4] Act of August 28, 1935, c. 792, 49 Stat. 942.

he be allowed to retain prossession, under the supervision and control of the court, of all of the remainder of his property, and for such further order as might be just and proper in the premises, as authorized by § 75(s). Shortly thereafter the debtors filed a petition for an order on the bank to compel it to release its asserted claim to the crop of oranges grown on their property in 1935. In opposition the bank not only asserted the validity of its lien, but urged that the proceedings be dismissed because § 75(s), as amended, was unconstitutional. The District Judge held that the bank had a lien on the 1935 orange crop but refrained from passing upon the validity of § 75(s), stating that he would decide that question at a later date if the parties so desired. Apparently the parties requested a ruling, and, on May 15, 1936, the Judge overruled the contention of the bank and refused to dismiss the proceedings.

Nothing having been done pursuant to the petition for appraisal and award of possession to Franz J. Borchard, the petitioners and respondents, on May 27, 1936, filed in the District Court a stipulation by the terms of which $3,900, held by third parties, being the proceeds of 1935 crops harvested from the premises, was to be paid to the bank and by it expended for the cultivation and improvement of the land. The District Court accordingly ordered the sum paid to the bank. June 10, 1937, the parties stipulated that $2,494, like proceeds of crops harvested, be paid to the bank, to be expended for the cultivation of the farm. The court so ordered. December 20, 1937, a stipulation was filed and an order made that $2,000 be paid to the bank, $1,500 to the debtors, and $946 applied to taxes. Finally, on March 7, 1938, pursuant to stipulation, $1,763 was released from the hands of third parties to be expended for the cultivation and preservation of the mortgaged real estate. The stipulation further provided that the bank should receive the monies realized from the sale of then growing crops and should apply them, so far as necessary, to maintain and protect the orange grove on the property.

All of the stipulations reserved the rights of the parties and were to be without prejudice to such rights.

May 24, 1938, the debtors petitioned the Conciliation Commissioner for an appraisal and the setting aside of the property to them. June 22, 1938, appraisers were appointed and they reported the

value of the real estate as $87,300. It does not appear what, if any, proceedings were had before the Conciliation Commissioner upon the coming in of the appraisers' report. The petitioners assert that the Commissioner was considering the terms of an order for a stay and the conditions to be inserted in that order. On November 10, 1938, however, the bank filed its petition in the District Court for leave to sell under its trust deeds. The petition recited the facts as above outlined, stated the principal and interest due under the various notes; set forth the amount of the advances the bank had made for taxes and other accounts, and showed an existing indebtedness, secured by deeds of trust and mortgage, totaling $89,246.82. It alleged that the mortgaged premises would not bring more than $65,000; that the bank had already suffered a serious loss; and that further delay in the sale of the property would entail a greater one. The court took testimony as to value and concluded that the real estate was not worth more than $65,000. It found that, as the debtors had had several years within which to arrange an adjustment of their obligations and had been unable so to do, it was fair and equitable that the bank be allowed to proceed so as to save itself further loss. The petition was granted and the outstanding restraining order was dissolved.

On appeal by the debtors the Circuit Court of Appeals affirmed the decree,[5] holding that the District Court's action was justified by our decision in *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U. S. 440.

We are of opinion that the action of the District Court in permitting the creditor to proceed to a sale for the enforcement of its liens at this stage of the proceeding was contrary to the provisions of § 75(s). That this is so is made plain by our decisions in *Wright* v. *Vinton Branch of Mountain Trust Bank*, *supra*, and *John Hancock Ins. Co.* v. *Bartels*, 308 U. S. 180. As was said in the latter case (p. 187):

"The scheme of the statute is designed to provide an orderly procedure so as to give whatever relief may properly be afforded to the distressed farmer-debtor, while protecting the interests of his creditors by assuring the fair application of whatever property the debtor has to the payment of their claims, the priorities and liens of secured creditors being preserved."

---

[5] Borchard v. California Bank, — F. (2d) —.

That orderly procedure includes an application by the debtor, such as was made in the present case, for an appraisal of the property, an order that the debtor remain in possession upon terms fair and equitable to him and to secured creditors, and the entry of a stay which will assure him of his possession for three years from the date of the order, upon the conditions mentioned in the Act. As a prerequisite to an intelligent determination of the terms under which the debtor is to remain in possession, the statute requires that the court and the parties shall be informed of the fair value of the property. As pointed out in the *Wright* case, *supra*, the secured creditors' rights are protected to the extent of the value of the property. The court may order rent to be paid by the debtor, may order him to make payments on account of principal, and, in its continuing control over the property, may enter any other orders for the protection of the debtor and secured creditors which the situation requires. Failure of the debtor to comply with any such orders may eventuate in a sale.

Instead of prosecuting the cause before the Conciliation Commissioner pursuant to the debtors' petition, the bank resorted to a procedure not contemplated by the statute, evidently on the theory that it could obtain some advantage by that course. By written stipulations the bank consented to the retention of possession by the debtors and arranged that they should cooperate in the cultivation of the farm, proceeds of the crops being used for further cultivation and conservation of the real estate, for payment of taxes, and for payments to the debtors. For more than thirty-one months after the petition for appraisal was filed no action was taken. An appraisal was thereafter made. No stay order has been entered fixing terms on which the debtors are to remain in possession. The petitioners were entitled to compliance with the procedure required by the statute. The bank, at any time, could have obtained action by the Conciliation Commissioner and the court, in accordance with the statute. It cannot now maintain that the disorderly and unauthorized procedure followed by the parties is the equivalent of that prescribed by the statute and that, as the petitioners have not been able to rehabilitate themselves, it is entitled to enforce its liens.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

So ordered.

MICRO CARD 22
TRADE MARK ®
39
1591 2
MATTHEW BENDER & COMPANY
MB
559
microcard